UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

STEVE KASSAB, Plaintiff, vs. SAN DIEGO POLICE DEPARTMENT, a municipal corporation, et al.,, Defendant.	CASE NO. 07cv1071 GPC (WMC) **ORDER DISMISSING PLAINTIFF'S MOTION FOR RECONSIDERATION** [DKT. NO. 182]

Pending before the Court is Plaintiff's motion to reconsider the Court Order issued on January 11, 2013 granting Defendant's motion to dismiss parties and limit the issues to be tried. ECF No. 182. For the reasons set out below, the Court **DENIES** Plaintiff's motion.

BACKGROUND

Plaintiff's amended complaint asserts several §1983 claims against Defendants, including false arrest and false imprisonment, assault and intimidation, and excessive force and battery. ECF No. 49. Plaintiff also alleged state law civil rights violations and intentional infliction of emotional distress. Id. On September 9, 2009, the Court granted Defendants' motion for summary judgment as to all of Plaintiff's federal claims and declined to exercise supplemental jurisdiction over

Plaintiff's state law claims. Dkt. No. 123. Mr. Kassab appealed the Court's ruling to the Ninth Circuit. Upon review, the Ninth Circuit affirmed in part, reversed in part, and remanded. Kassab v. San Diego Police Department, 453 F. App'x 747, 748 (9th Cir. 2011). The Ninth Circuit held that the district court properly granted summary judgment on Mr. Kassab's §1983 claims "concerning the searches of his store, his arrest, and his prosecution because these claims are *Heck*-barred." Id. at *748. See also Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). The Ninth Circuit also upheld summary judgment on the excessive force claim "alleging that defendant Nunez slammed a car door on his knee because Kassab failed to create a genuine dispute of material fact as to whether Nunez acted intentionally." Id. The Ninth Circuit further upheld the excessive force claim against the "City of San Diego defendants because there was no underlying constitutional violation as to the car door incident, and Kassab failed to create a triable dispute as to whether the exposure to excessive heat was the product of a city custom or practice or a failure to train." Id. The Ninth Circuit reversed summary judgment on only one issue - Kassab's excessive force claim that "he was detained in a police car for more than four hours, with the windows rolled up, no air conditioning, and an interior temperature of 115 degrees." Id. The Court of Appeals held that a genuine issue of material fact existed as to whether the police used excessive force in leaving Kassab in the hot police car. Id. Accordingly, the Ninth Circuit reversed summary judgment on the claim "as to the individual officers" and remanded for further proceedings. Id.

On January 11, 2013, the Court granted Defendant's motion to dismiss parties and limit the issues to be tried. ECF No. 181. In that order, the Court dismissed all but two Defendants, San Diego Police Officers Skinner and Hernandez, pursuant to the Ninth Circuit ruling which affirmed in part, reversed in part, and remanded the case back to the district court. Kassab, 453 F. App'x 747. The Court further held that the only issue to be presented at trial would be the one excessive force count

that was reversed and remanded pursuant to the aforementioned Ninth Circuit ruling. Id.

Plaintiff asks this Court to set aside its ruling based on two arguments. First, Plaintiff asserts that the Court improperly dismissed Officer Millet because she was the arresting officer and therefore should remain a Defendant. ECF No. 182 at 2. Second, Plaintiff contends that the City of San Diego should also remain a Defendant. Id. In opposition, Defendants point out that Plaintiff fails to acknowledge the Ninth Circuit opinion affirming the District Court's granting of summary judgment as to all issues except one excessive force claim. ECF No. 183 at 2. Defendants further contend that the admissible evidence in the matter shows that only Officers Skinner and Hernandez were involved in the arrest of the Plaintiff, and that any allegations that Officer Millet was involved in the arrest are mere conjecture or inadmissible evidence. Id. at 3. Defendants also assert that the City of San Diego should not be a named Defendant in the matter because the claims against the City are *Heck*-barred and the District Court's findings dismissing those claims were affirmed by the Ninth Circuit.

DISCUSSION

A district court may reconsider an order under either Federal Rule of Civil Procedure 59 (e) (motion to alter or amend a judgment) or Rule 60(b)(relief from judgment). Under the local rules, a party that files a motion for reconsideration of an order must set forth the material facts and circumstances surrounding the motion, including any new or different facts and circumstances that are claimed to exist which did not exist, or were not shown, upon such prior application. L. Civ. R. 7.1.i. Motions for reconsideration offer an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." Carroll v. Nakatani, 342 F.3d 934, 945 (9th Cir.2003). Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or

the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

Plaintiff first argues that the Court wrongfully dismissed Officer Millet because she assisted with his arrest. Plaintiff attaches to his declaration a statement by Officer Hernandez that indicates he assisted Officer Millet in the execution of the arrest warrant for Steven Kassab. ECF No. 182, Exhibit 2. The statement further details a planning meeting between Officer Millet and Officers Hernandez and Skinner prior to the operation taking place which lead to Plaintiff's arrest. Defendants object to the submission of the statement as inadmissible evidence that has never been brought forth before the Court. Defendants further contend that the statement does not show that Officer Millet participated in the arrest of Mr. Kassab. Defendants remind the Court that the Ninth Circuit's ruling affirmed the Courts summary judgment on all counts with the exception of one excessive force claim by Officers Hernandez and Skinner and, as such, Officer Millet was properly dismissed.

The Court will not rely on evidence that could have been made available to the Court prior to the order granting summary judgment, which the Ninth Circuit affirmed on all but one count. Although Plaintiff brings this motion for reconsideration of the order dismissing defendants and limiting the issues at trial, it appears that Plaintiff is also attempting to re-litigate the previous order granting summary judgment. For example, Plaintiff states that he has the right to show that Officer Millet is personally liable under 42 U.S. C section 1983. ECF No. 182 at 6. However, the allegations of a violation of 42 U.S.C. section 1983 were dismissed by the Court and the Ninth Circuit affirmed that ruling. If the proffered evidence was available before disposition of the motion for summary judgment, then as a matter of law the movant is not entitled to reconsideration based upon that evidence. All Hawaii Tours, Corp. v. Polynesian Cultural Ctr., 116 F.R.D. 645, 649 (D. Haw.

1987) rev'd, 855 F.2d 860 (9th Cir. 1988)(citing Trentacosta v. Frontier Pac. Aircraft Industries, 813 F.2d 1553, 1557–58 n. 4 (9th Cir.1987); Frederick S. Wyle P.C. v. Texaco, Inc., 764 F.2d 604, 609 (9th Cir.1985)). Here, Plaintiff failed to demonstrate that the evidence could not have been obtained before the Court ruled on defendant's motion for summary judgment. The Court now refuses to consider the evidence after the Ninth Circuit has ruled upon the appeal of the order granting summary judgment. The Court further refuses to review new evidence upon reconsideration of a completely separate order seeking to implement the Ninth Circuit's decision.

Plaintiff's argument that the Court improperly dismissed the City of San Diego also fails for similar reasons. Plaintiff again asserts 42 U.S.C. section 1983 claims against the City of San Diego, an issue that was dismissed by the Court and affirmed by the Ninth Circuit. ECF NO. 182 at 7. The Ninth Circuit found that Mr. Kassab "failed to create a triable dispute as to whether the exposure to excessive heat was the product of a city custom or practice or a failure to train." Kassab, 453 F. App'x 747. As the Ninth Circuit affirmed dismissal of this claim, and as Plaintiff has not stated any other reason to support his argument, the Court refuses to reconsider its decision dismissing the City of San Diego as a defendant.

Plaintiff has not brought forth any other assertions that the Court has committed clear error, that the decision was manifestly unjust or that there was an intervening change in controlling law. For these reasons, the Court stands by its January 11, 2013 order dismissing all defendants except San Diego Police Officers Hernandez and Skinner, and limiting the issue to be tried to the one excessive force claim. ECF No. 181.

CONCLUSION

IT IS HEREBY ORDERED that Plaintiff's motion for reconsideration is **DENIED**.

DATED: April 17, 2013

HON. GONZALO P. CURIEL
United States District Judge